

Benefits to the public from Tasini

(New York Times Co. v. Tasini, (00-201)
533 U.S. 483 (2001) 206 F.3d 161, affirmed.)

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1. Background

The 1976 Copyright Act reduced the harshness of the pre-1967 copyright law's "doctrine of indivisibility," allowing an author to split his bundle of rights without losing them all, or forcing an author to arrange for the publisher to hold those rights in trust. The Tasini case raised an issue of first impression concerning the meaning of the word "**revision**" as used in §201(c) of the 1976 Copyright Act.

Freelance "Authors," as independent contractors, had written articles for newspapers and magazines (the "Print Publishers"), and did not consent to their articles being placed in an electronic database. The Print Publishers, licensed rights to an electronic media producer ("Database Producer") to sell/publish the same articles. Electronic versions were created and presented in two different ways. In the **first format**, each article would appear as a separate item within a search result. The articles would appear to the user in a text-only format without the graphics, formatting, or other articles with which it was initially published. The **second format**, was an image-based system that reproduced articles exactly as they appeared on the printed pages, with other materials published on the same page or pages, complete with photographs, captions, advertisements, and other surrounding materials, but without any material published on other pages of the original periodical.

The Authors sued, and the Print Publishers and Database Producer raised the "collective work" privilege of §201(c) of the Copyright Act. It was **held** that, in either circumstance, **the database failed to reproduce or distribute the articles "as part of" either the original edition or a "revision" of that edition**, and thus the copyrights of freelance writers (Authors) had been infringed.

Andrew Snyder argues that "The protection of public access went out the window in Tasini with serious consequences," and resulted in "the immediate disappearance of our nation's history." (Snyder, 2002) I strongly disagree. And I am not as pessimistic as some who say "Existing law frustrates digital library growth and development by granting overlapping, overbroad, and near-perpetual copyrights in books, art, audiovisual works, and digital content." (Travis, 2005)

2.

The dual copyright system

Once an article is published in a collective work, Section 201(c) of the 1976 Act creates a dual copyright system. First, the freelance author has an individual copyright formed at the moment he created the article. Second, the publisher has a copyright to the article as part of a collective work.

Section 201(c) "Copyright in each separate contribution to a collective work is distinct from copyright in the **collective work** as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular **collective work**, any **revision of that collective work**, and **any later collective work in the same series**. 17 U.S.C. §201(c)

3.

Rationale of the Court's decision

The original versions of the newspapers or magazines were not wholly recognizable in these databases and the end product was an ever-changing database that could never be equated with an edition of an evening newspaper. Merely aggregating articles in electronic packages and selling them in those forms, has the effect of overriding the author's exclusive right to control the individual reproduction and distribution of each article.

4.

Comparing microform to an electronic database

Database articles appeared disconnected from their original context, as they offered users individual articles. On the other hand, microfilm offers intact periodicals. The question under §201(c) was not whether a user could assemble a revision of a collective work from a database (like putting together a jigsaw puzzle), but **whether the database itself perceptibly presented the author's contribution as part of a revision of the collective work**. Microfilm and microfiche systems show photographic reproductions and were considered "revisions" because of the exact replication of the parent magazine or newspaper. Articles from databases were not shown to the public (the subscribers to the service) the same way that articles are shown to the public from microfilm, and therefore the U.S. Supreme Court ruled (7 to 2) that the databases did not amount to any "revision," but instead were seen as "compendiums." (Opinion, Ginsburg)

5.

Exceptions that did not save the publishers

Determining whether the articles in question as presented to the public in the electronic databases were part of a "collective work," did not turn on what type of format was used to present the material, contrary to assertions of the Dissent and Mr. Snyder. Rather, it turned on **how it was perceptively presented** to the public.

The database simply did not fit within any exception of §201(c). The perceptive presentations from the electronic databases were not (1) part of a collective work to which the author contributed, (2) nor were they part of any revision thereof, (3) nor were they part of a later collective work in the same series. The differences in the original collective works and the electronic database versions were striking, and failed to perceptively reproduce or distribute the articles as part of either the original edition or as a revision of that edition.

6.

Dissenting opinion

The Dissent questions how much context is enough to perceptibly amount to a "revision." I dare say that the articles in question lacked so much context that any grade schooler could discern the difference. A "revision" would be a bound volume of past series, and this simply was not available.

7.

Today's technology

Our technology is capable of producing electronic formats that are exact replications of the parent magazine or newspaper and therefore "revisions." We have the technology to electronically reproduce a series of rather old magazines, with original formatting and accompanying images, with each article appearing exactly as it appeared on the printed page, compete with photographs, captions, advertisement, and other surrounding materials as well as wrinkles in the pages, and simultaneously provide text. Nowadays, all magazines and newspapers have an electronic version before any printed version can be made. It is now fairly easy to produce an electronic version of a bound volume of a series of magazines, along with plenty of search features.

8.

Too much technology could ruin a "revision"

I wonder whether the placing of various icons, and pop-ups, throughout the articles in a "revision" (an electronic bound volume) would cause it to lose the status of being a "revision." If the icons and pop-ups did not exist in the original version, the result might be a "compendium." But to resolve such a problem, a separate service existing side by side on the computer screen could eliminate the problem.

9.

Benefit to the public

Librarians, researchers and archivists, while they were initially forced to remove thousands of newspaper and magazine freelance articles from public access, were benefitted in the long run. We now know what a "revision" is. Publishers have the technology to publish the material in question without violating the copyright of the authors, and the result is a better product. The public, more specifically students, teachers, attorneys and researchers, will gain from *Tasini*.

10.

How this affects collection development policy

When librarians order an electronic reproduction of a previously created work, they can insist on high quality products that essentially amount to electronic bound volumes. Stand-alone search engines could reduce the risk of losing the "revision" status. Today there is no good excuse for not producing "revisions" (electronic bound volumes). Librarians, nation-wide, can develop their own industry standard search engine(s) that would work with "revisions" and they can demand that all products comport with the requirements of the search engine.

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